TESTIMONY OF SALLYANNE PAYTON
BEFORE
THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
ON
JUNE 24, 2004
ON
REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. Chairman and Members of the Subcommittee:

I greatly appreciate your invitation to testify in favor of the reauthorization of the Administrative Conference of the United States, known as ACUS or "the Conference." I am the William W. Cook Professor of Law at the University of Michigan Law School. I served on the Conference continuously through five presidential administrations as a Public Member and then a Senior Fellow, beginning in 1978 and ending in 1995 when the Conference was disbanded. In 2001-2002 I was Chair of the American Association of Law Schools Section on Administrative Law. Since 1998 I have been a Fellow of the National Academy of Public Administration and a member of its Standing Panel on Executive Organization and Management (EOM Standing Panel). I currently serve as a Director of the Academy.

My testimony today has been coordinated with that of Sally Katzen, and I concur in her views. Since she cannot be here in person today she has authorized me to speak to any questions regarding her testimony. My testimony also reflects the views of the EOM Standing Panel, which recently met and deliberated on the question of restoring the Administrative Conference. The panel voted to express its strong view in support of reauthorization. I will focus these remarks on the reasons for this solid endorsement.

One of the challenges of managing a government as diverse in mission and organization as is the Government of the United States is to locate responsibility for common functions where they can be performed most effectively at the appropriate scale. Administrative processes and procedures are ubiquitous in government, but being matters of technique rather than substance they tend to claim a smaller share of the attention of agencies and the Congress than do more concrete and pressing concerns.[1] They are not for that reason unimportant. It is through administrative processes and procedures that most people interact with government. These processes and procedures are part of the essential infrastructure of government, and continuous attention must be paid to them. The ability of government to conduct itself appropriately, and to monitor and improve its procedures and processes, is therefore a critical piece of organizational competence. It is true that the judiciary has power to review agency action at the behest of an appropriate party with a legally-protected interest, but judicial review is available for only the thinnest sliver of the work of government, and in any event the mission of the courts is to decide disputes and to focus on larger-scale institutional relationships, not to improve administrative systems.

There is thus a void, which the Administrative Conference was created to fill. The Conference was a remarkable institution. In the current argot of organizational theory, it would be called a "community of practice." In her 1994 testimony in support of the reauthorization of ACUS, Sally Katzen described the Conference as it then existed:

> By statutory design, a majority of the Administrative Conference's members represent government departments and agencies. All major departments and agencies are represented and each department or agency chooses its own representative. The caliber of the individuals who represent these agencies attests to the importance that the agencies, as well as the Administration, assign to the Administrative Conference's functions. . . . The government officials join forces with distinguished private citizens, called "public members"--law professors, public interest lawyers, private practitioners, economists, public administrators--who volunteer their time and talent because they share the view that this unique public-private partnership significantly improves the way government regulates its citizens or delivers services to them. The Administrative Conference Act requires that the Administrative Conference chairman select members from the private sector who are "members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure." . . . The Administrative Conference ha[d]s a long-standing tradition of private sector membership that crosses party and philosophical lines . . .[2]

I am sure that all of the witnesses before this Committee who have been on the private side of this public-private partnership would attest that serving as a Public Member of the Conference was challenging, the work being frequently complicated, esoteric and technical. Nonetheless, Public Members of startlingly distinguished professional standing viewed participation in the Conference as a high calling and worked their way devotedly, largely at their own personal expense, through procedural and process issues of which no notice was likely to be taken outside of the circle of administrative lawyers, and for which they would receive no credit.

This willingness on the part of the leaders of the administrative law community to contribute personally to the work of ACUS was an expression of their commitment to improving the important below-the-radar processes that are critical to the well-being of those who have to depend on or do business with government. I think, for example, of the work that ACUS did on the process for designating "representative payees" for Social Security recipients who cannot care for themselves but who have not been declared legally incompetent.[3] What was unique about the Conference was that highly-compensated lawyers, leading academicians who specialized in constitutional theory, and sitting federal judges who turned out to be future Supreme Court Justices, among others, believed that making sure that processes of this sort were tailored correctly was worth their time, because these processes mattered to the public.

Even partisan competition was subordinated to the members' determination to achieve good administrative principle and practice. The Conference's bipartisanship was so pervasive that it functioned as nonpartisanship, in the tradition of "good government."

Like any organized community of practice, the Conference maintained an informal institutional memory and a repository of useful information that was made available to those

who sought its advice, whether or not they were located in the Executive Branch. It is worth remembering in this context that at any given time a substantial fraction of the people who have responsibility for designing, conducting or reforming administrative processes and procedures are new to their jobs, or have never had occasion to think about the type of issues confronting them. There are new Hill staffers and new independent agency commissioners, who need a source of trustworthy information and advice. Turnover among agency officials produces a constant inflow of people who need to be informed about their responsibilities. Best practices need to be identified and information about them disseminated. No individual agency is in a position to maintain a comprehensive information base on federal administrative process and procedure; nor can any administrative or other operating agency always take on the role of thinking conceptually about its own work in the context of general principles of administrative process. Responsibility for these functions must be centralized; it must be prestigious; and it must be impartial. The Conference was all of these things. Some of the greatest praise for ACUS has come from Members of Congress who had occasion to call on it for information and advice. Many members of the EOM Standing Panel have had similar experiences, and view ACUS as having been a highly useful organization.

The case for restoring ACUS thus seems overwhelming to my colleagues on the EOM Standing Panel, because we have great respect for its unique – and, as we have observed during the years since its demise, irreplaceable -- function. Much has changed during the past ten years, however, and we understand that among those who favor placing ACUS back in service there might be some sentiment for modifying its charter to give the organization a broader role and responsibility, and an instruction to take on matters of greater salience. On this point the members of the EOM Standing Panel were unable to agree among ourselves, and we urge the Committee to be cautious. It is not intrinsically difficult to attract high-level attention to high-visibility issues; it is much more difficult to attract high-level attention to low-visibility issues. The genius of ACUS was that although its charter was (and still is) flexible enough to encompass virtually any subject that can plausibly be characterized as a matter of "agency organization, procedure, or management"[4], as distinct from pure substance, its broadly representative structure drove it away from issues that might have provoked partisan strife and toward addressing a continuous stream of low-salience problems that were important to people who actually had to deal with the government. As we have learned during the years of its absence, if ACUS does not do this work, no one will. We urge the Committee to reauthorize ACUS using the existing language of its charter, to put ACUS back together as nearly as possible just as it was, and to allow ACUS to find its own way in its new environment.

I thank the Subcommittee for reexamining this issue and for considering the restoration of the Administrative Conference.

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[1] This observation was a principal motivation for the creation of ACUS as a permanent body. Here is what Judge E. Barrett Prettyman wrote to President Kennedy after having led two committees studying the possibility of creating the Conference:

> The heavy pressures on Government to discharge immediate responsibilities may at times rob administrators of the time needed for consideration of procedures. Imperfections in method . . . may acquire the protective coloration of familiarity; and the demands of the daily job may lessen the will to achieve change . . . . The committees of Congress, suitably concerned as they are with matters of substantive policy,

can only sporadically occupy themselves with the details of methodological and organizational problems . . . Nor do we think that hope of major accomplishment lies in occasional studies by groups external to the Government . . . . *The current need is for continuous attention to somewhat technical problems*, rather than for public enlightenment concerning a few dark areas that cry for dramatic reforms. A discontinuous commission . . . is unlikely to have great impact upon the day-to-day functioning of the Federal agencies. *Letter from Judge E. Barrett Prettyman to President John F. Kennedy* (Dec. 17, 1962) (urging establishment of permanent Administrative Conference) (on file with ACUS), cited in *Testimony of Sally Katzen before the House Committee on the Judiciary Subcommittee on Administrative Law and Governmental Relations in Support of the Reauthorization of the Administrative Conference of the United States, April 21, 1994*, reprinted in 8 ADMIN. L.J. AM. U. 649, 653 (1994) (emphasis supplied).

[2] *Id.* at 652.

[3] Administrative Conference of the United States, Recommendation 91-3: The Social Security Representative Payee Program, 1991 ACUS 17.

[4]5 U.S.C. § 594 provides:

To carry out the purpose of this subchapter, the Administrative Conference of the United States may (1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs . . . .

5 U.S.C. § 592 (3) defines "administrative procedure":

"administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.